



February 20, 2020

VIA EMAIL

Melanie Ruiz
Chief, Branch of Litigation/FOIA
Division of Ecological Services
USFWS-Southwest Region
P.O. Box 1306
Albuquerque, NM 87103
Email: fw2foia@fws.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, 43 C.F.R. Part 2, American Oversight makes the following request for records.

According to press reporting, the U.S. Army Corps of Engineers awarded a \$400 million contract to build barriers on the U.S.-Mexico border to Fisher Sand and Gravel, an organization for which President Trump has personally advocated.¹ Fisher Industries' CEO, Tommy Fisher, has been a vocal proponent on conservative media of both the President and the border wall project. Prior to the contract award, Fisher Industries had been working with We Build the Wall—a crowd-funded effort run by Brian Kolfage—to pay for portions of a border wall using private funds.²

American Oversight seeks records to shed light on whether and to what extent the President's apparent personal interest in awarding a large contract to a specific company has influenced the federal government's procurement process.

Requested Records

American Oversight requests that the U.S. Fish & Wildlife Service (USFWS) Southwest Region produce the following records within twenty business days:

¹ Nick Miroff & Josh Dawsey, *North Dakota Company that Trump Touted Gets \$400 Million Border Wall Contract*, WASH. POST, Dec. 2, 2019, https://www.washingtonpost.com/immigration/north-dakota-company-that-trump-touted-gets-400-million-border-wall-contract/2019/12/02/9c661132-1568-11ea-bf81-ebe89f477d1e_story.html.

² *Id.*



All email communications (including emails, email attachments, calendar invitations, and attachments thereto) between (a) any of the USFWS Southwest Region officials listed in Column A below and (b) any of the external parties listed in Column B below:

Column A: USFWS Southwest Region Officials	Column B: External Parties
<ul style="list-style-type: none"> i. Regional Director Amy Lueders ii. Deputy Regional Director Jeff Fleming iii. Chief of Southwest Region Refuge Wildlife System Aaron Archibeque iv. Assistant Regional Director for External Affairs Mary Elder v. Special Agent in Charge Phillip Land vi. Chief of Southwest Region Migratory Birds Scott Carleton vii. Assistant Regional Director for Fish and Aquatic Conservation Stewart Jacks viii. Assistant Regional Director for Science Applications James Broska ix. Assistant Regional Director for Ecological Services Pete Fasbender x. Chief of Wildlife Sport Fish and Restoration Cliff Schluessner 	<p>Fisher Sands and Gravel, Fisher Industries, and related individuals:</p> <ul style="list-style-type: none"> i. Tommy Fisher ii. Grant Fisher iii. Ryan Fisher iv. Anyone communicating from an email address ending in @fisherind.com or @fishersandandgravel.com v. Scott Sleight (including, but not limited to, the email address scott.sleight@acslawyers.com) vi. Senator Kevin Cramer and any of his staff (including, but not limited to, email addresses ending in @cramer.senate.gov or @kevincramer.org) <p>We Build the Wall:</p> <ul style="list-style-type: none"> vii. Brian Kolfage (including, but not limited to, email addresses bkolfage@gmail.com or bkolfage@yahoo.com) viii. Stephen Bannon or anyone communicating on his behalf (including, but not limited to, spokesperson Alexandra Preate) ix. Erik Prince x. Tom Tancredo xi. Kris Kobach xii. Curt Schilling xiii. Jennifer Lawrence xiv. Robert S. Spalding III xv. John Daniel Moran, Jr. xvi. Mary Ann Mendoza xvii. David Alexander Clarke, Jr. xviii. Steve Ronnebeck xix. Dustin Sotckton

	<ul style="list-style-type: none"> xx. Tiffiny Ruegner xxi. Amanda Shea xxii. Sara Carter xxiii. Anyone communicating from an email address ending in @webuildthewall.us xxiv. Anyone communicating from an email address ending in @briankolfage.com
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Please provide all responsive records from September 1, 2019 through the date of the search.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency’s regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.”³ The public has a significant interest in the construction of a border wall and in ensuring that related contracts are not being awarded because of political favors. Records with the potential to shed light on this question would contribute significantly to public understanding of operations of the federal government, including whether and to what extent the President has personally intervened in a federal government procurement process.⁴ American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public’s understanding of the government’s activities would be enhanced through American Oversight’s analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.⁵ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials.

³ 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ Miroff, *supra* note 1.

⁵ *See* 5 U.S.C. § 552(a)(4)(A)(iii).

American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.⁶

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.⁷ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;⁸ posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;⁹ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁰ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹¹ and posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political

⁶ American Oversight currently has approximately 15,500 page likes on Facebook and 101,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 7, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 7, 2020).

⁷ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁸ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

⁹ *See generally Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *see, e.g., Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

¹⁰ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹¹ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹²

Accordingly, American Oversight qualifies for a fee waiver.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹³ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.¹⁴
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,¹⁵ and many agencies

¹² *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹³ *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); *cf. Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

¹⁴ *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁵ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive

have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Hart Wood at foia@americanoversight.org or

Departments & Independent Agencies, "Managing Government Records Directive," M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

202.873.1743. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight